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MEMORANDUM

NSLP 2006-06
RCCI 2006-06

TO: School Food Authorities

FROM: Pat Cook and Katherine Stewart, Consultants
Office of Child Nutrition and School Health

SUBJECT: Procurement Questions

USDA is continuing to receive questions regarding procurements in the Child Nutrition Programs, particularly in the National School Lunch and School Breakfast Programs. Below are the most recently received questions and answers:

Question 1: Can a school food authority (SFA) enter into sole source contract with a supplier that advertises itself as the sole provider of a product or service in the marketplace?

Answer: No. In the Child Nutrition (CN) Programs, a sole source situation only occurs when the goods or services are available from only one manufacturer through only one distributor or supplier. The decision that a sole source situation exists must be made by the SFA, not the supplier. While one supplier may offer goods and services that contain features not available from other suppliers, the SFA must be able to document that those specific features are required, not just preferred. Since sole source procurement takes place without the benefit of competition, an SFA must maintain appropriate documentation that supports its decision.

SFAs should be reminded that a sole source situation is a condition of the procurement environment not a procurement method. Again, while a supplier can claim its products are the sole products available in the marketplace that meet the SFA's needs, the advertisement alone doesn't make the claim true. SFAs that fail to validate such claims may subsequently enter into improperly procured contracts.

Question 2: What happens if an SFA enters into a sole source contract improperly?

Answer: When solicitation and contract deficiencies are identified, the SFA cannot fund the contract costs, including any ongoing and maintenance costs, from the nonprofit food service account. This result can impose a substantial burden on the school district. Thus, if the SFA is unsure whether a sole source situation exists, we recommend the SFA contact its State agency to obtain prior approval before proceeding.

Question 3: Can an SFA amend an existing contract to add a new deliverable such as a point of service system (POS) at the recommendation of their food service management company (FSMC), when the FSMC has indicated that the company providing the POS is a preferred provider of the FSMC?

Answer: Generally not if the new deliverable represents a material change to the contract. Prior to deciding whether to amend an existing contract or conduct a new procurement, the SFA must first determine whether the amendment is permitted under the terms of its original solicitation and resulting contract. Additionally, public SFAs must also determine whether the amendment would be permitted pursuant to applicable State and local procurement requirements. When the amendment was not addressed in the solicitation documents, then the SFA must determine if the amendment creates a material change to the existing contract. Material changes are changes that are substantial enough that had other bidders been aware of the change during the bidding process they might have bid differently. If the amendment creates a material change, the SFA must either conduct a separate procurement to obtain the deliverable or conduct a new solicitation for a FSMC that includes the deliverable.

Question 4: Is there a dollar threshold that must be used when determining whether a change to an existing contract is material?

Answer: No. While the cost of a proposed amendment is a factor that SFA should use in determining whether a proposed change is material, there is no minimum threshold. As discussed in the answer to Question 3, a key factor in determining materiality is whether other bidders knowing of the change would have bid differently.

Question 5: How should an SFA determine whether a purchase should be made using sealed bidding or competitive proposals?

Answer: When deciding whether sealed bidding using an invitation for bid (IFB) or competitive proposals using a request for proposal (RFP) should be used, the SFA needs to consider a number of factors. Commercially available items should be acquired using the sealed bidding method because the items can be adequately identified, ancillary services such as delivery and handling can be specified, and the requirements for a responsible and responsive bidder can be described. When these conditions exist, the only remaining factor in the award of the contract is cost.

On the other hand, when developmental work is needed, the acquisition generally lends itself to competitive proposals. In developmental acquisitions, the expectations and outcomes can usually be met by more than one method and acceptable offers will differ both technically and financially. When deciding to use competitive proposals, the SFA must also have sufficient skill and expertise to evaluate and rank proposals and conduct negotiations with top offers. Since the response to an RFP consists of two distinct elements, the technical proposal and the cost proposal, the negotiation process requires

significant experience and skill in negotiation. SFAs that don't possess staff with effective negotiation skills may have to incur additional costs to allow for the contracting of an individual(s) with the appropriate negotiation skills, which is another factor that SFAs must consider.

Question 6: Doesn't using an RFP allow a SFA to award a contract without price being the most important factor?

Answer: No. The goals of sealed bidding and competitive proposals are the same. These goals are to obtain the best product/proposal at the lowest price. Part 3016.36(d)(3)(iv) provides that when using the competitive proposal method, the award is made with "price and other factors considered". Price is listed first because it is the primary factor in the award of a contract when using competitive proposals. While we are aware that many view the competitive proposal method as a means to avoid considering cost in the award of a contract, such views contradict Department regulations and good business practices. The only acquisition not subject to price consideration is the evaluation of qualifications-based procurement of architectural/engineering (A/E) professional services (Part 3016.36(d) (3) (v)). This method, "where price is not used as a selection factor", is only available for the procurement of A/E professional services, which rarely occurs in CN programs. "It cannot be used to purchase other types of services".

Because price is the primary contract award factor when using competitive proposals, FNS recommends the use of the two-step RFP process. Under this process, technical proposals are solicited, evaluated and ranked before cost is considered. Once the SFA has identified its top-ranked offers, the SFA enters into negotiations with these offers. These negotiations are directed at obtaining equivalent, not necessarily equal technical proposals, any of which would meet the SFA's needs. Once equivalent proposals are obtained, the SFA requests these offers submit best and final prices. The award is then made to the offer submitting the lowest price since all of the negotiated offers have been deemed acceptable.

SFAs that do not use the two-step approach must develop evaluation and ranking criteria that identify cost as a primary factor. Once the technical and cost components of the proposal have been evaluated and ranked, the SFA negotiates both components. This form of negotiation can be very complex since both the technical and cost components will be changing throughout the negotiation process. At the conclusion of these negotiations, the award is made to the offer presenting the most advantageous proposal, with price used as the primary factor in the award decision.

Question 7: Must SFAs always negotiate when using competitive proposal method?

Answer: While the negotiation phase is not mandated, the primary benefit of this procurement method is lost if negotiations are not conducted. An SFA that will not be exercising its rights to negotiate should seriously evaluate whether competitive proposals are the appropriate procurement method for its planned acquisition since it can obtain the same results using sealed bidding.

Question 8: Recently, one of our public SFA's received a bid protest. Should we send the protest to FNS?

Answer: No. Pursuant to 3016.36(b) (12), SFAs must have procedures in place to handle disputes relating to their procurements and are responsible for resolving bid protests.

Question 9: Nevada Department of Education's memorandum NSLP 2005-70 or RCCI 2005-51 " Procurement of automated meal accountability systems in conjunction with the procurement of a food service management company" The memorandum addresses the Schools Interoperability Framework (SIF), a nonprofit membership organization. Does this mean that FNS endorses SIF?

Answer: No. It is not the practice of FNS to issue endorsements. The attachment reflected a presentation made at the School Nutrition Association's, formerly the American School Food Association, July 2002 National Conference which was included in our memorandum within the context of the answer to question 10 of the April 29, 2005, memorandum. Neither the answer to question 10 nor the attachment represents an endorsement of SIF by FNS.